United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2266

UNITED STATED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2266

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P/S

UNITED STATES OF AMERICA,

Appellant,

-against-

ANDREW FUREY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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2

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Questions Presented	2
POINT I	
THE GOVERNMENT HAS NO RIGHT OF APPEAL	3
POINT II	
THE EASTERN DISTRICT RULES ARE VALID	4
CONCLUSION	6

TABLE OF CITATIONS

Cases:	Page
Barker v. Wingo, 407 U.S. 514	5
Hilbert v. Dooling, 476 F2d 355	5
Mississippi Pub Corp. v. Murphee, 326 U.S. 438	4
Strunk v. United States, 412 U.D. 434	5

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BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

This is the third time that this matter has been before this Court.

The defendant was arrested on December 19, 1972 and was admitted to bail on the following day. Sometime in February, 1973, the Assistant United States Attorney was instructed to proceed against the defendant as a juvenile. On June 21, 1973, an information was filed and the defendant consented to be treated as a juvenile offender. The case was next called on December 13, 1973, at which time the defendant made an oral motion to

dismiss.

A hearing was held on the motion and the motion was denied by Judge Dooling.

Judge Dooling denied a stay for the purposes of appeal at this point and a petition for a stay was dismissed by Judge Friendly in this Court. A hearing was conducted on January 2nd and 3rd, 1974 and the defendant was adjudged a juvenile delinquent.

On July 2, 1974, this Court vacated the judgment and remanded the case. The remand was on a very narrow issue.

> "The District Court, after considering such additional evidence as may be relevant should make findings of fact on the issue of excusable neglect. If it determines that the motion should be denied, it shall enter a new final judgment thereby preserving Furey's right to further Appellate review. In the event it determines that the motion should be granted, the charges against Furey should be dismissed."

Following a further hearing, Judge Dooling dismissed the charges on August 26, 1974.

Following this hearing and before the decision was rendered by Judge Dooling, the government, for the first time, raised the issue which it now urges on appeal, that is that the rule itself is invalid.

QUESTIONS PRESENTED

1. Does the government have a right of appeal at this juncture of the case?

2. Is the rule in question valid?

P O I N T I

THE GOVERNMENT HAS NO RIGHT OF APPEAL

This Court considered the question of possible further appeals and specifically limited the right of any further appeal to the defendant. The final paragraph of the decision, (A23) makes this abundantly clear.

Furthermore, since the issue of the validity of the rules could have been raised in the prior appeal, and certainly should have been, if the government felt they were invalid, the rule of the law of the case should be applied. While it is true that under given circumstances, this Court has inherent power to re-consider a decision where a question was or should have been litigated, it goes without saying that such power should be rarely invoked. There is no claim advanced in this case that there is any excuse for failure to litigate the issue in the prior appeal. No authorities are cited subsequent to last July and it appears that the present appeal is simply an excercise in petulance on the part of the government.

P O I N T I I

THE EASTERN DISTRIC RULES ARE VALID

The government argues that the mere fact that the rule 50B was promulgated by the Supreme Court, is not conclusive as to its constitutionality. In fact, a case is cited, Mississippi Pub Corp. v. Murphee 326 US 438, 444, in which the Court states that this question is open to consideration. The argument will be more persuasive, however, if a case could be found in which the Court ruled against itself. In the Murphee Case, the Court considered the question and decided in favor of the validity of the rule.

The government submits a lengthy brief, but nowhere does he provide any authority for the statement that this rule or any similar rule is unconstitutional or invalid.

An argument is advanced that the Eastern District plan and the speedy trial rules constitute an erosion of the powers of the Presidency. It is claimed that the President's right of veto has been destroyed.

The answer to this, of course, is that the President could have vetoed the enabling legislation in the first place, if a legislative or judicial conspiracy were feared.

A further argument is advanced that dismissal is an improper sanction.

A reading of page 11 of the government's brief would imply that the Supreme Court has disapproved the remedy of dismissal.

This, however, is not the case. The full quotation from Barker v. Wingo 407 US 514, 522, is as follows:

> "The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy." _ Emphasis supplied.

The case of Strunk v. United States 412 US 434 dealt with the narrow issue of the power of the Court of Appeals to direct a less drastic remedy. The Strunk Case held at page 439:

> "Indeed, in practice, it means that a defendant who may be guilty of a serious crime will go free, without having been tried." 407 US at 522. But such severe remedies are not unique in the application of constitutional standards. In the light of the policies which underlie the right to a speedy trial, dismissal must remain as Barker noted, "the only possible remedy." Ibid.

It is also puzzling to note the statement in the government's brief that Hilbert v. Dooling 476 F2d 355 did not litigate the issue of the validity of the rules. The decision clearly states "the government suggests that the circuit counsel is powerless to promulgate a rule having the effect of mandating dismissal with prejudice".

The government's brief concludes with an appeal to preserve at this point not the executive perogatives, but the legislative rights of congress. This plan, in no way, infringes upon congress-

ional rights since the Congress could at any time, make contrary provisions. The failure of Congress to act in this regard is certainly an indication that they feel that the rights of the public, as well as the rights of the individuals require the enactment of the present plan.

This Court has been faced with a parade of cases following the Hilbert Case, in which there was ample opportunity to strike down the circuit counsel plan or the Eastern District plan. The silence of the decisions on this issue is surely an indication that the various prosecutor's offices were well aware and well convinced of the validity, fairness and necessity of these rules.

We may include in these cases the prior appeal in the case at bar.

C O N C L U S I O N

The judgment of the District Court dismissing the information should be affirmed.

Dated: November 7, 1974

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NASSAU)SS.:

Laura Papa being duly sworn deposes and says: that she is over the age of 18 years; that on the 7th day of November, 1974, she served the named attorneys who represent the parties herein set opposite their names by enclosing a true copy thereof in a securely postpaid cover addressed to each of them as follows:

Clerk
United States Court of Appeals
Second Circuit
Foley Square
New York, New York 10007

DAVID G. TRAGER
United States Attorney
Eastern Distruct of New York
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Brooklyn, New York 11201

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and by depositing the same in a post office box regularly maintained by the United States Government within the State of New York. Deponent further says that the said attorneys are the attorneys for the parties set opposite their names herein, and that the addresses set forth on said wrappers are the office and post office addresses given by the said attorneys upon the last papers served by them in the within action.

Laura Papa
Laura Papa

Sworn to before me this
7th day of November, 1974

Raymond Joseph Fury JR
Notary Public, State of New York
R

RAYMOND JOSEPH FURY JR
Notary Public, State of New York
No. 30-6432715
Qualified in Nassau County
Commission Expires March 30, 1974